In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-327

DENNIS HART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was removed from his position as a Criminal Investigator with the Internal Revenue Service on a charge of conspiring to solicit and accept a bribe (Pet. App. A-49 to A-51), and appealed to the Civil Service Commission. A hearing was held at which petitioner was represented by counsel; the tribunal received documentary and testimonial evidence. Included in the evidence was the transcript of criminal proceedings at which petitioner appeared as a defendant to an indictment charging him with conspiring to accept a bribe.

The Civil Service Commission sustained the removal, and petitioner filed a petition in the Court of Claims seeking reinstatement and the recovery of lost wages on the grounds that his removal was procedurally defec-

tive and denied him due process of law (Pet. App. A-1). The Court of Claims granted summary judgment to the United States because "the procedures were proper" and the removal decision "was neither arbitrary nor capricious and is supported by substantial evidence" (*ibid.*).

1. Petitioner contends that because "[t]he allegations contained in the criminal indictment were not identical to the charge in the notice of proposed adverse action, * * * [p]etitioner's opportunity to defend was impaired" (Pet. 8), and that, therefore, the Civil Service Commission should not have received the transcript into evidence. However, the criminal trial transcript contained evidence relevant to the charge upon which petitioner's removal was based and petitioner, through counsel, had an opportunity to cross-examine the witnesses against him at the criminal trial.[1] Evidence of this nature is properly and routinely considered by the Civil Service Commission in removal cases.[2] *Polcover* v. *Secretary of the Treasury*, 477 F. 2d 1223, 1231-1232 (C.A. D.C.); *Finfer* v. *Caplin*, 344 F. 2d 38 (C.A. 2), certiorari denied, 382 U.S. 883; *Cohen* v. *United States*, 369 F. 2d 976 (Ct. Cl.), certiorari denied, 387 U.S. 917. Moreover, although, according to petitioner, the most damaging part of the transcript was the testimony of Leslie Atkinson (Pet. 12), the Court of Claims concluded that the Civil Service Commission's decision was "based on substantial evidence of plaintiff's conduct aside from Atkinson's testimony" (Pet. App. A-3).

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[1]Petitioner's contention that the Government failed to provide him with a "copy" of the transcript (Pet. 3, 12) is misleading. As the record below shows (Def. Exh. 1, p. 2), the transcript was forwarded from Civil Service Commission headquarters to the office of the hearing examiner in St. Louis, at the request of petitioner's counsel, for the express purpose of permitting petitioner's counsel, whose office is in St. Louis, to have access to it. Petitioner did not ask for a "copy" of the transcript either before or during the hearing.

[2]In Civil Service Commission proceedings "[r]ules of evidence are not applied strictly." 5 C.F.R. 772.305(c)(4).

2. Petitioner argues that the charge against him was "vague" and "impossible of rebuttal, reply denial or mitigation" because it did not allege "any specific *overt act* perpetrated in furtherance of an alleged conspiracy" (Pet. 8). This contention is inaccurate. Under 5 C.F.R. 752.302(a) petitioner was entitled "to an advance written notice stating the reasons, specifically and in detail, for the proposed action." The notice he received from the Internal Revenue Service contained the following charge (Pet. App. A-54):

> *Charge 1*: Conspiring to solicit and accept a bribe.
>
> *Specification 1*: On or about December 26, 1969 at Goldsboro, N.C. you conspired to solicit and accept a bribe, as a government employee, from Leslie Atkinson to aid him in a pending narcotics case in the Eastern District of New York. You conspired with Richard M. Patch, a former government employee, in the solicitation and acceptance of the bribe.

This charge is clear and specific, and it gave petitioner sufficient notice of the grounds for his proposed removal. Cf. *Arnett* v. *Kennedy*, 416 U.S. 134. The charge in this case would have been adequate even were it a criminal indictment.

3. Finally, petitioner claims that at the first level of his Civil Service Commission appeal the hearing examiner, in sustaining petitioner's removal, improperly relied upon a certain exhibit which at the hearing he had ruled inadmissible (Pet. 9-10). However, as both the Court of Claims and the Board of Appeals and Review of the Civil Service Commission pointed out (Pet. App. A-2, A-7), the exhibit in question reflected the report of Inspector Thompson, who also testified under oath at the Commission hearing "substantially recounting the facts of the exhibit" (Pet. App. A-2). The error, if any, was

therefore harmless, particularly in light of petitioner's failure to challenge the conclusion of the Court of Claims that his removal is supported by substantial evidence.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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